84-820

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

EARLENE POLYAK — Petitioner

vs.

FRANK HULEN AND
WILMA LESNANSKY — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FROM
THE SUPREME COURT OF TENNESSEE

EARLENE POLYAK
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Questions Presented

The questions presented by ruling are:

Whether the Court of Appeals erred in supporting Order to sell property and violated right to property.

II

Whether Court of Appeals erred in refusing to hear case.

III

Whether Rule 3, Tennessee Rules of Appellate Procedure which allows non appealable judgment violates equal protection and due process and constitutional.

IV

Whether initial trial in violation of Petitioner's right to fair trial, and a New Trial granted.

V

Whether Trial Court should have heard evidence of agreement to divide property in preference to partition and divided land, or granted just compensation for property to be sold at public auction.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE SUPREME COURT OF TENNESSEE

Petitioner Earlene Polyak, prays that a writ of certiorari issue to review the judgment of the Court of Appeals and the Supreme Court of Tennessee.

OPINIONS BELOW

The opinion of the Court of Appeals in Case No. 83-405-II is set forth in Appendix A. The opinion of the Supreme Court of Tennessee is seth forth under Case No. 83-405-II in Appendix B. The

opinion of the Chancery Court of Lawrence County, Lawrenceburg, Tennessee is set forth in Appendix C.

JURISDICTION

The judgment of the Supreme Court of Tennessee, Middle Division, was entered on August 27, 1984. This petition for writ of certiorari was filed within ninety (90) days thereof.

The jurisdiction of this Court is invoked pursuant to Article III, Section 2, of the Constitution of the United States which states that the judical power shall extend in all cases in law and equity between citizens of different States. It is invoked in Article III which states private property can not be taken for public use without just compensation, and in Article XIV, Section I, which prevents the State from denying due process and equal protection. Petitioner believes

that a portion of another part of the constitution may be invoked by the deprivation of the retirement home from a handicapped person as cruel and unusual punishment inflicted.The Older American Act may be involved. The jurisdiction of this Court was invoked when counsel for Plaintiff identified Petitioner as a non-resident on the Complaint which denied due process and equal protection in the Courts of Tennessee.

CONSTITUTIONAL PROVISIONS

The pertinent portion of Section 2, Article III, of the United States Constitution provides as follows:

> The judical power shall extend to all cases, in law and equity, arising under this constitution, ... between citizens of different States;

U.S. Const., Article III, Sec. 2.

The pertinent portion of the Fifth Amendment to the United States Constitution provides as follows:

> No... person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., V, CL 3 and 4.

The pertinent portion of Section 1 of the Fourteenth Amendment to the Constitution provides as follows:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV.

STATEMENT OF CASE

The property in this case involves a 40 acre farm belonging to Rena Ann Hulen, who died intestate on January 9, 1976. Within one week after her death Respondents contacted Petitioner and stated that it would be in our best interest to divide said property.It was agreed that petitioner would get small house and acreage in front of it in exchange for Respondents getting a larger share of land, which was very

high and 46 year old house was in a poor condition with a leaking roof.

As a result of this agreement, Petitioner and her husband, Alex Polyak invested a considerable sum of money and hard work in restoration of new roof and repairs and maintaining property, which involved traveling from Michigan to Tennessee at least twice a year in preparation for a retirement home.

In 1982, Respondent Frank Hulen stated that he wanted the property sold so his kids could buy it. It appears that Respondent Wilma Lesnansky, who is dependent on Frank in many ways conceded to his threats and joined him in the Complaint to sell the farm.

The Attorney who had represented the family since 1976, filed a Complaint and Restraining Order against Respondent. The Complaint identified Respondents as residents and citizens of Lawrence County,

Tennessee, and Respondent as non-citizen residing in Michigan. Petitioner believes this identification is allowed in this State and denies equal protection of the laws according to the Fourteenth Amendment...

Prtitioner was born and raised in Tennessee, but she is not familiar with local attorneys, and has only been to Court once to collect rent and unfamiliar with the Courts in this area.Petitioner retained the services of one attorney, who promised to try her case for partition in kind to support the agreement to divide, and interest in the property. She begin to suspect that he was trying to sell the property and when he asked if she wanted a private or public sale by auction, and stated the property would have to be sold so her nephews could bid in it to find the true value, and relieved him of his services.

The second attorney was retained after

contacting the Lawyer Referral Service, which later admitted that they did not require credentials of the presons they recommend. This attorney stated that he wanted $1500.00 to do reseach and go against his friends to defend Petitioner. He promised to try the case for partition in kind to support agreement to divide and protect her interest and investment in the property.

Prior to the hearing which Petitioner was obligated to cross State lines and County lines in 102degree heat wave, Petitioner asked counsel twice to reschedule hearing as she suffers with heart problems and there was a nationwide warning to heart patients to stay out of heat. He claimed counsel for the Respondents absolutely refused to delay this hearing, which was conducted while the jury was out on another trial. Petitioner objected twice that her sister who signed the compalint was not there to testify to

the agreement to divide the property. It was later learned that her son, who was witness to the agreement was out of the State. It appears these incidents were planned to withhold evidence about the agreement.

The hearing was held on July 29, 1983, at Columbia, Tennessee, with the Honorable Jim Hamilton presideng. Counsel for Plaintiff presented a Real Estate Salesman and Auctioneer, who stated the property could not be divided. Counsel for defense presented a Real Estate Salesman, who went to the farm and actually measured the property and divided it according to three parts of equal value. The Judge did not allow the lawyer for the defense to question Plaintiff Frank Hulen about the agreement, but he did establish that Petitioner had restored house and spent money maintaining it, and had a new roof installed.

After the lawyer objected to the Judge, Petitioner was allowed to testify as to the

agreement between co-tenants to divide this property since 1976, and described the divisions already agreed upon before Plaintiff's decision to sell so his kids could buy the property. Petitioner testified that there were not really any problems between the co-tenants prior to his dicision. The Judge stated that the property would have to be sold when the lawyer for the defense stated to give a summary. Counsel for the Respondents held the order to sell from August 11, 1983, to November 19, 1983, before it was entered, which is against local laws.

Petitioner found that the order to sell had been entered on November 7, 1983, which left only a few days to appeal. After learning that her counsel had not appealed, she filed in a notice of appeal to keep the case from expiring. After he found out about the notice, he promised to submit a motion for a New Trial and she withdrew notice of appeal.

The hearing for a New Trial or for Alteration or Amendment of Judgment preiviosly entered was held on December 19, 1983,By this time, Petitioner was throughly convinced that this counsel was trying to help sell the property too. The Judge did not grant her any money for the roof, repairs, and maintenance of the house for more than seven years and counsel stated that he would not grant the new trial or the money invested. Petitioner was of the opinion that counsel had brought her case back to the local Court to help speed the sale of the property. On the above date, petitioner asked the Judge to allow her to argue her own case. He had the notes zeroxed and allowed Petitioner to argue her case from her notes, which she tried to get entered into the record later, but he has ignored all motions etc. submitted by her. The judge overruled the motion and instructed Petitioner to get her appeal into the Court in 90 days.

As a result of the hearing on December 19, 1983, a Judgment which was written by counsel for Plainitffs was entered on December 20, 1983, and an Order of dismissal of counsel for the Petitioner, was submitted and entered on January 10, 1984.

The Trial Clerk filed the Technical Record on January 26, 1984, just 23 days after the notice of appeal was filed. It appears that she requested Oral Argument for Counsel for Respondents as Petitioner did not receive any motions for dismissal of the case from him.

This case was dismissed by the Court of Appeals on March 2, 1984. A Petition to Rehear was submitted and briefs were allowed as to whether the Judgment was appealable and whether the notice of appeal was timely submitted,(See app. A, pp. 5 and 6), on March 20, 1984. Petitioner was scheduled to appear in the Chancery Court in

Lawrenceburg, Tennessee, on April 2, 1983, which was during the ten day period allowed to answer counsel's brief. As a result of travel, Petitioner became ill with her heart and only had one day to answer brief.

Petitioner was not sure as to the reason she was to go to Court in Lawrenceburg, and hired a stenographer to prepare a transcriot of these proceedings,which shows some of the confusion and hostility displayed toward her in this case.The Judge certified counsel for the Respondent's Statement of Evidence, which Petitioner objected to as late and heresay, over her objective verbatum descrption of both Court proceedings, and the Report of the Realator who divided the property in equal partitions.

The Appeals Court dismissed this case on March 26, 1984. In the dismissal on March 2, 1984, the Court stated there was not a notice of appeal, the statement of evidence was not entered, and the judgement was not

appealable. In the Order issued on March 20, 1984, they found that the notice of appeal had been certified by the Trial Clerk, the statement of evidence was not yet due, and allowed briefs. In the Order issued on April 26, 1984, the Court of Appeals states that this case was initialy dissmissed for failure to timely file a notice of appeal, then supports counsel for Respondent's argument that instead of the judgment prepared by them, Petitioner should have appealed the Order dismissing counsel for the defense, entered on January 10, 1984, of which she did not know existed, as counsel had been relieved of his services and did not have the authority to sign Orders for her. The Court of Appeals adds to this decision, the first decision on March 2, 1984, that the judgment is not appealable and supports the sale of the property by the Trial Court, but promises to review any and all actions of the Trial

Court after the property is sold. This is the decision that is the main subject of this request for review by certiorari.Petitioner believes this decision is against to her constitutional right to enjoy, her property and depriving her of her property without due process and equal protection of the laws. The sale of this property is denying her the money already invested in the property without just compensation, and in addition the cost of this sale is being added to her loss and is irreparable damage and a loss to her property to never be regained.

Petitioner has applied to the Supreme Court of Tennessee to appeal and was denied for the second time on August 27, 1984. She has observed that all of the decisions on her cases are issued around holidays when the dockett may be cleared. Petitioner has petitioned the United States District Court in Nashville to review this case and has been denied. She prays that a writ of certiorari issue to review this case.

Statement Of Facts

Petitioner Earlene Polyak entered into an agreement to divide the property with co-tenants in 1976, and has kept this agreement with good faith. She has taken possession of 46 year old house on her partition of this property restored it with a new roof and numerous other repairs. Petitioner has restored house and maintained property at her own expense and continues in possession to this date.

REASONS FOR GRANTING WRIT

The Court of Appeals has erroneously ruled, and denied its supevisory power to correct judgment not appealable as a right, when it supports the sale of property by the Trial Judge. This judgment was prepared by counsel for Respondents and in their favor, and denies Petitioner the right to her property and due process and equal protection of the laws of the State of Tennessee. In Petitioners Opinion, the Court of Appeals denies right of appeal in suspicious circumstances, which should be cause to hear appeal.

The Order issued on March 2, 1984, was based on the premature filing of the Technical Record of the Trial Clerk, and it appears that an Oral Argument was verbally requested at this time.The appeal was dismissed because the notice of appeal had not been included in the record, and and the old notice of withdrawl substituted. The Court then states that a Statement of Evidence that is not yet

due should be included.For all these reasons and the judgment prepared by counsel the appeal is dismissed.

On March 10, 1984, Petitioner filed a Petition to Rehear.On March 20, 1984, the Trial Clerk certified the notice of appeal and the Court of Appeals finds the notice timely filed and decides to hear briefs.

On March 26, 1984, the Court of Appeals dismisses the Appeal because the notice of appeal was filed on the judgment, which was writtien by counsel for Respondents, and Petitioner was instructed to get appeal in within 90 days. The Court states that the Order dismissing counsel for Petitioner, which tries to with draw a cause she has already argued in Open Court with premission of the judge should have been appealed. This Order was signed by the judge counsel for the Respondents, and counsel for Petitioner, without her authority or knowledge. It was later found in the returned materials and is

a misrepresentation. All of these incidents and the confusion should have been cause to hear this appeal from a layman.

The Federal District Courts have jurisdiction where diversity of citizenship exists over actions involving the possession and use of land, and "action for partition for real property," Beebe v Louisville N.O. & T R. Co. (1889)39f. 481. And it appears that the local Courts are trying to change Federal law. "the most significant of small town politics is the frequency with which the legal and procedural requirements are overlooked and ignored... (so as) to take account of unique conditions, such personalized government even at the local level can be as offensive as it is may be intimate and effective..." Wood, Suburbia 278-80(1958). The Fourteenth Amenment guarantees that any State shall not deprive any person of life , liberty or property without due process of las and equal protection of its laws.

The Court of Appeals goes further in the Order on March 26, 1984, to promise Petitioner that it will review any and all actions of the Trial Court after her property is sold at cost to her. If the Order to sell issued on August 11, 1983, was held 54 days when the local law allowed seven days before enterance into the record, and the Judgment overruling Petitioner's argument for a New Trial, or compensation for money invested in retirement home, and an Order was issued on December 19, 1983 hearing, both signed by the Trial Judge, it appears an"appeal timely perfected and and properly prosecuted from a final judgment may never be issued in this case. The Fith Amendment guarantees " nor shall private property be taken for public use, without just compensation." Petitioner's property is ordered sold at auction and the Auctioneer is named in the order. She has been informed this notice of sale will run in the local paper for four weeks.

The Court of Appeals erred when it refused to review decision of the Trial Court to deny patition in kind according to agreement between co-tenants in 1976. The agreement to divide preceded the law suit to sell property by seven years and should take precedent, because Petitioner took possession and made improvements in good faith and consideration with the intention to perpare a retirement home."... the promise with the knowledge of the promiser takes possession of land and makes improvements. Courts of equity in almost all states in such circumstances have granted the promisee specific performance," Hagerty v. Haggerty, 186 Iowa 1329, 172N.W. 259 (1919) "It is now recognized that the decision enforcing promises to give land are based on promissory estoppel".Greiner v. Griener, 131 Kans. 760, 293, p. 750(1930).Petitioner has made improvements to property and Respondents do not deny and have knowledge of her possession.

CONCLUSION

Petitioner believes that Respondents should honor 1976 agreement to partition this property, and prays that a writ of certiorari issue to review this appeal.

Respectfully submitted,

Earlene Polyak
3179 Middlefield Drive
Trenton, Michigan 48183
(313) 676-3364

I certify that the above information is true and correct to the best of my knowledge and belief.

Earlene Polyak

Sworn and subscribed before this 19th day of December 1984.

Mary M. Barreto
Notary Public

My comission expires June 27, 1987

MARY M. BARRETO
Notary Public, Wayne County, Michigan
My Commission Expires June 27, 1987

APPENDIX A

In the Court of Appeals of the State Of Tennessee, Middle Section at Nashville.

Frank Hulen and Wilma Lesnansky, Plaintiff-Appellees v. Earlene Polyak Defendant- Appellant.

Civil Action Appeal No. 83-405-II.

Filed: April 26, 1984.

Appeal from the Chancery Court of Lawrence County, Lawrenceburg, Tennessee. This appeal is from the Order to sell property entered on October 19, 1983 and denial of Motion for a New Trial or for Alteration and Amendment of Judgment entered on December 19, 1983. The Honorable Jin Hamilton presiding at both hearings.

Presiding at the Court of Appeals: Judge Henry F. Todd P.J., Judge Samuel L. Lewis, Judge Ben H..Cantrell, and Judge Lewis H. Conner, Jr.

The constitutionality of the judgment issued by theCourt of Appeals, which supports the Order to sell this property for partition by the Trial Judge, then promises a review of any and all actions of the Trial Court, after the property is sold is the cause of this appeal. The sale of this property including Petitioner's investment and the cost of the sale by public auction is depriving her of her property and by public sale without just compensation which vidates the Fifth and Fourteenth Amendments. Petitioner objected to the initial hearing as being unjust and unfair and against her constitutional rights to her property before the Trial, when she requested a New Trial on December 19, 1983, and has continued this objection throughout the appeal.

On December 19, 1983, the Trial

Judge overruled Petitioner's request for a New Trial, which was based on an unfair and unjust hearing in which her property was ordered sold and without just compensation. Petitioner objected(1) to being taken across County lines for trial, which is against Tennessee State law;(2) Respondent Wilma Lesnansky was not at the trial,and did not testify;(3) valuable information was withheld from the trial; (4) Petitioner's case was not given adequate time and consideration by the Court due to the hearing being conducted while the jury was out on another trial.

The Motion for Alteration and Amendment of the Order previously entered was predicated on the Court's failure to award Petitioner for repairs and restoration of the house and accrued value in the house and the property.

It was also pointed out that Respondent's were withholding rent which Petitioner had a right to from the crops. The Trial Judge overruled this motion and instructed Petitioner to get her appeal in within ninety (90) days.

The above described judgment was entered on December 20, 1983, and the notice of appeal was filed in the Trial Court on January 3, 1984, and in the Court of Appeals on January 4, 1984.

The clerk of the Trial Court filed the Technical Record in the Court of Appeals on January 26, 1984, which was just 23 days after the notice of appeal, and an expected Oral Argument was scheduled April 30 - May 4, 1984. It appears that this argument was an oral request as Petitioner was not served by a motion to dismiss the appeal by counsel for the Respondents.

Petitioner filed a Motion to Stay Briefing time for the Transcript of Evidence before receiving the dismissal of the appeal on March 2, 1984.This case was dismissed because the Technical Record did not contain a notice of appeal. It appears an old withdrawl notice had been substituted for the notice of appeal, and the Statement of Evidence which was not due,had not been submitted.

The Order dismissing the appeal stated that the Chancellor entered a "Judgment" and an"Order " on December 20, 1983,which follows:

JUDGMENT

> This cause came on to be heard on the 19th day of December, 1983, before the Honorable Mim T. Hamilton, Judge, upon the Motion this day filed by the defendant, personally in her own behalf, Statement and argument of the Defendant, Earlene Polyak, in her own behalf, from all of which the Court finds there to be no merit, and said Motion is here and now overruled in its entirety.

ORDER

This cause came to be heard on this the 19th day of December, 1983 before the Honorable Jim T. Hamilton Judge Part II of the Circuit and Chancery Courts of Lawrence County, Tennessee, on the Motion for a New Trial or for Alteration or Amendment of the Order previously filed herein by Defendant, Earlene Polyak, by and through her counsel of record Henry, Henry & Stack; and upon the oral motion of said Earlene Polyak to be allowed to represent herself pro se and that Henry, Henry & Stack be relieved as counsel and further that the aforementioned Motion not be heard by this Court:
IT IS HEREBY ORDERED that Henry,Henry & Stack are relieved as counsel in this cause and that the aforementioned Motion for a New Trial, etc, be and is hereby dismissed.

The judgment was prepared by counsel for Plaintiff's and signed by the Judge and entered on December 20, 1983. Petitioner was instructed to appeal this judgment by the Trial Judge. The Order was prepared by counsel for the defense after he was dismissed by written notice form this case. It was signed by the Trial Judge, counsel for the Plaintiff's and Defense.

Both of these documents are a result of the same hearing. Petitioner found the Order in the materials returned by counsel for the defense, was unaware it had been signed, believes counsel did not have the authority to sign it as he was dismissed on December 19, 1983. The Court"ordered that this appeal be and it is hereby dismissed as untimly with out prejudice to any future appeal as a right upon the entry of a final, appeal-able judgment."

Petitioner filed a Petition to Rehear on March 12, 1984, stating that the Technical Record had been filed prematurely, the brief and Statement of Evidence were not due until ninety days after the notice of appeal was filed on January 4, 1984.These items were not due until March 19, 1984.

On March 20, 1984, the Court of Appeals

granted a rehearing stating the appeal was dismissed because " no timely appeal appeared in the record certified to this Court by the Trial Clerk", and verified the notice of appeal was filed on January 4, 1983, and the time to file the Statement of Evidence had not expired.

On April 2, 1984, Petitioner was scheduled to appear in the Chancery Court at Lawrenceburg, Tennessee, to certify the Statement of Evidence at the same time she should be answering the brief on the rehear from counsel for the Plaintiff, which involved travel and illnes as a result of Petioner's health, and she only had one day to answer this brief.

At the hearing on April 2, 1983, counsel for Plaintiffs ambigiguous statement of evidence was certified by the Trial Judge over Petitioner's assertion that it was late and heresay. A transcript of this proceeding is in the Appendix.

Counsel for Plaintiff submitted a brief on the rehear on March 30, 1984, which tried to confuse the withdrawn notice of appeal submitted on November 19, 1983, before the hearing on December 19, 1983, and alleged that Petitioner should have appealed the Order from this hearing, which she had no knowledge had been submitted, instead of the Judgment.

After Petitioner assumed own case she found that the counsel for the defense did not submit bills for repair of property, Memorandum Brief, Evaluation and partition of the property in equal value. Motions to correct the record were submitted while this case was on appeal, were ignored by the Trial Judge.

On April 10, 1984, a brief in response to Appellee's brief on Petition to Rehear was filed. Petitioner insisted that " The party insisting on

the sale must show clearly by the facts, the necessity for such sale, and nothing shortest of the clearest and most satisfactory proof can justify the Court ordering the sale against one (1) of the tenants in common." Reeves v. Reeves, 58 Tenn. 669.

On April 26, 1984, the Court of Appeals dismissed the appeal stating

> And it appearing fron the record that appellant's motion to alter or amend was heard on December 19, 1983, that on January 3, 1984, appellant filed a notice of appeal " from the final judgment entered on December 20, 1983, but the order overuling appellant's motion to alter or amend was not entered until January 10, 1984.
>
> ...and it further appearing that the judgment from which appeal sought is not a final judgment appealable as of right under TRAP Rule 3 in that said judgment orders the sale of property but does not confirm any sale or order transfer of title;
>
> It is therefore ordered that this appeal be and hereby dismissed at at the cost of appellant without prejudice to review of any and all actions of the Trial Court by appeal timely perfected and properly prosecuted from final judgment.

Petitioner asserts that the judgment appealed was prepared by counsel for Plaintiff and the Trial Judge instructed her to appeal it within 90 days, that the Notice of Appeal, Main Brief, and Statement of Evidence were all timely filed. The Order is a dismissal of counsel for the defense which was signed by the Judge, and counsel for Plaintiff without Petioner being notified, and is against her right to be informed.The cost of the sale of this property added to the denial of the Trial Judge to compensate Petitioner for her investment in the restoration of the house on this property for a retirement home is depriving her of her right as a citizen of another State, and property without due process and equal protection, and taking said property for public auction without just compensation. Petitioner will suffer irreparable damage and lose a right to her property which can never be regained.

APPENDIX B

Frank Hulen and Wilma Lesnansky, Plaintiff-Appellees v. Earlene Polyak, Defendant-Appellant.

Civil Action No. 83-405-II.

In The Supreme Court of Tennessee, Middle Division. Application for Permission to Appeal submitted on May 17, 1984, and denied on July 2, 1984.

Petition to Rehear Denial of Application for Permission to Appeal to the Supreme Court submitted July 12, 1984, and denied on August 27, 1984.

A Motion to Permit Second Petition to Rehear was filed on September 4, 1984, and denied on October 1, 1984.

Presiding: William Foner, Chief Judge, and Ray Brock, Robert Cooper, Frank Drovota, and William B. Harrison, Associate Judges.

The application for permission to appeal the dismissal of this case by the Court of Appeals on April 26, 1984, was based on the right to appeal and that the sale of this property would cause irreparable damage and the loss of a right of interest that can never be regained. The need for the supervisory power in the protection of Petitioner's right to appeal and the right to her property was requested from the Supreme Court.

Petitioner tried to explain that the judgment which the Court of Appeals ruled was not a final judgment appealable as a right pursuant to Rule 3, of the Tennessee Rules of Appellate Procedure, was prepared by counsel for the appellees. The Order which was signed for the defense was signed after counsel was dismissed and a misrepresentation of his authority.

Petitioner presented questions as to the right of the layman to appeal in the State of Tennessee, and asked for an examination of mistakes in the Trial and Appeal Court. She assured the Supreme Court that all documents had been timely presented and that her case was properly before the Court.

It was suggested that if the wording of the Judgment presented by counsel for Appellees is not appealable, Rule 60.0 , T.R.A.P., " gives the Court power to correct this judgment", and Rule 60.02, supra. allows the Court to correct the misconduct of an adverse party."

Counsel asserts that the Order entered on January 10, 1984, should have been appealed.Petitioner informed the Trial Judge that she was without counsel and he promised the clerk would keep her informed, but the Trial Clerk stated

she was not required to do this service. Rule 58, T.R.A.P.," adds the requirement that a judgment or other action of the Court cannot be filed until it bears not only the signature of the judge, but also (1) the signatures of all parties or their counsel." Petitioner was never informed of this order.

If this order is the one that should have been appealed, Petitioner's notice of appeal was submitted six days prior to the order. T.R.A.P., Rule 4(d) states that " a notice of appeal filed before the entry of the judgment shall be treated as filed after such entry and on the day thereof." Subdvision (d) establishes the general rule, that a right of appeal is not lost by filing the notice of appeal before entry of judgment appealed. Again, the notice of appeal is properly before the Court.

Counsel argues that Petitioner"s motion for a New Trial or Alteration and Amendment is not in the record and was not overruled by an order. The motion was argued from notes zeroxed with permission of the Judge on December 19, 1983. Petitioner has submitted many motions to correct the record to show this motion for a new trial etc., which have been ignored by the Trial Judge.

Petitioner maintains that the Trial Judge overruled the motion for a new trial with a verbal order and written judgment. Judge Cantrell ruled in a case filed on January 19, 1983,.that",the Court reasoned that while 58.02 T.R.A.P., indicates that a motion can be disposed in some way other than by filling an order.."the Trial Judge had orally overruled Appellant's motion and wrote the word overruled on the motion dockett...Gillam v. Butler,

663 S.W. 2d, 801 (Tenn. App. 1983). These cases are similar in that the Trial Judge overruled this motion for a new trial etc., with a judgment, therefore the appeal is properly before the Court.

The laws of the State of Tennessee allege appeal as a right but allow Rule3, and a judgment to deny this right.

> " The writ of certiorari in lieu of an appeal ought to be granted only where the petition shows that injustice has been done the Petitioner and a reasonable excuse is offered for not having appealed, as where the appeal has been defeated or prevented." Jones Motor Car Company, 10 Tenn. App. 179 (1929).

Petitioner believes this appeal has defeated and prevented and unjustly dismissed and the State of Tennessee is denying due process and equal protection.

In the reply brief, counsel for Plaintiff instructed the Court that to grant appeal would result in the Court having to hear this case again after the property is sold.

The Petition to Rehear Denial of Application for Permission to Appeal to the Supreme Court was filed on July 12, 1984. Petitioner asserts thatthe Court neglects to consider the need to secure a uniformity of decision as to whether the Judgment, or Order resulting from the Motion for a New Trial or Alteration and Amendment of Judgment on December 19, 1983, should have been appealed. And whether allowing this action constituted a plain and palapable abuse of discretion by the Trial Judge.

Petitioner asserts that the major part of the evidence in this case has been excluded and supressed, and the Courts opinion relies on matters of fact upon which she has no control, has not been heard and is open to reasonable doubt. Petition informs the Court that she was labeled a non-resident by counsel for

Plaintiffs which denies equal protection, and begs for Oral Argument. Again, Petitioner begs the Court to hear her case because the sale of her property will result in irreparable damage and the loss of a right to her property that can never be regained.

Petitioner asserts that the appeal is properly before the Court.She points to the many mistakes by the Trial judge such as crossing county lines for the hearing which is against Tennessee State law. The hearing was held while Petitioner was ill, and while the jury was out on another Trial. The Judge did not send the Commissioners to measure the property for partition in kind according to the law supported by Statute of Tennessee. And the Trial Judge's Order to sell this property was not based on conclusions supported by law. " The trial judge's

conclusions of law upon facts as found in his written findingd are not conclusive upon the Appellate Courts. Citizen's National Life Insurance Company v. Witherspoon, 127 Tenn. 363, 155 S.W. 139(1912).

The Court is reminded that Petitioner has prepared this house for retirement and that it is not manifestly in her best interest that this property be sold." A sale for partition, where there is no evidence to show its necessity, will be set aside. Bradbury v. Martin, 3 Shannon's Cases 469 (1975).

Petitioner asserts that the agreement to partition this property since 1976 is binding. She informs the Court that she is in possession of this property and has been restoring and maintaining it since this agreement went into effect in 1976. " Parole

Partition of land followed by persons in possession is binding and enforceable." Martin v. Taylor, 521 S.W. 2d 582 (Tenn. 1975).

A motion to Releave and Revise Judgment and Order pursuant to Rule 60.02 T.R.A.P., was included with this Petition the Rehear Denial of Application fo Permission to Appeal.

Counsel for Appellees did not present a brief in answer to this Petition To Rehear.

This Petition to Rehear the Denial of Application for Permission to Appeal was denied on August 27, 1984.

A Motion to Permit Second Petition to Rehear Denial of Application for Permission to Appeal to the Supreme Court was filed on September 4, 1984. This motion was predicated on the fact that partition in kind is favored by statute in Tennessee, and that the commissioners were not required to examine the property before the order to sell was issued as favored by statute.

The motion was also predicated on the fact that the Appellees did not meet the burden of proof that said property could not be partitioned according to agreement in 1976. The Court was reminded that this agreement was a contract , which is binding and enforceable by law.

Petitioner reminded the Court that the request for a new trial had been denied, and that the Trial Court did not award her for the restoration

and maintenance of the property since 1976. And that the sale of this property will cause irreparable damage and the loss of a right which can never be regained. It is not manifestly in the best interest of the Petitioner.

This motion for a second rehear the application to appeal was denied on October 1, 1984, and exhausted all appeals in the State of Tennessee.

APPENDIX C

The Chancery Court of Lawrence County, Tennessee, Lawrenceburg, Tennessee.

Frank Hulen and Wilma Lesnansky, Plaintiff v. Earlene Polyak, Defendant.

Complaint and Restraining Order filed April 19, 1983. Case No. 1974

Trial July 29, 1983, before the Honorable Jim Hamilton. This complaint was filed in the Chancery Court of Lawrence County, Lawrenceburg, Tennessee.The hearing was conducted at Columbia, Tennessee, which is in Maury County, and held while the jury was out on another trial. Judge ordered property sold.

The Order to sell the property was formaly issued on August 11, 1983. It was held by counsel for the Plaintiffs until October 19, 1983, and entered on this date.

Notice of Appeal was filed on November 14, by Earlene Polyak, because there were

only three days left to get appeal in and Petitioner feared the the attorney for the defense was going to allow the order to sell the property to become final.

Motion for New Trial or for Alteration or Amendment Judgment previously entered was filed on November 17, 1983.

Letter giving notice to set Notice of Appeal aside submitted on December 6, 1983, and letter notifying that a new Notice of Appeal would be required from Court Of Appeals,Clerk, received on December 6, 1983, after pending motion was heard.

Motion for a New Trial or for Alteration or Amendment of Judgment heard on December 19, 1983, by the Honorable Jim Hamilton, and verbally denied on this date. Motion overruled and Trial Judge instructed Defendant to get appeal in within ninety (90) days.

Notice of Appeal filed in the Chancery Court of Lawrence County, Lawrenceburg, Tennessee, filed on January 3, 1984, and the Court of Appeals, State of Tennessee, Middle Section at Nashville, filed on January 4, 1984.

Main Brief filed on February 23, 1984.

Statement of Evidence mailed to Trial Clerk, with notice of mailing and issues to counsel for Plaintiffs , on March 2, 1984. Motion to enter into the record in the Court of Appeals filed on March 13, 1984.

STATEMENT OF CASE

Mrs Rena Ann Hulen died intestate on January 9, 1976. At the time of her death she had been residing in a nursing home in Lawrenceburg, Tennessee for several years.She was 84, years of age, a permanent citizen and resident of Tennessee,

and possed a 42-acre tract of land situated in the 14th Civil District of Lawrence County, Tennessee. Mrs. Hulen left the following lawful,living children: (1) Plaintiff Frank Hulen, age 72; (2) Defendant, Earlene Polyak, age 62; and (3) Plaintiff Wilma lesnansky, age 58.

Within one week after Mrs. Hulen's death, Plaintiffs contacted Defendant at her home in Michigan and stated that they wanted to divide this property and that division would in all of our best interests, and Defendant agreed. It was agreed that Defendant would have small house and acreage in front of it and in exchange Plaintiffs would divide the rest of the land which would give them more than an equal share as land was very at this time.

As a result of this agreement, Defendant and her husband traveled to

this property at least twice year from Michigan to restore the house with a new roof, paint wood, paint blocks, and numerous other repairs, and maintained with termite control, insurance,electricty and telephone.

In July 1982, Plaintiff Frank Hulen stated that he wanted to sell the property so his kids could buy it, and was able to persuade Plaintiff Wilma Lesnansky to join him and they went to Court in 1983, with the counsel who had represented the family since 1976.

Defendant was forced to seek counsel Lawrenceburg.She relieved the first attorney after he asked whether she wanted a public or private sale as he had promised to try the case for partition in kind to protect Defendant's investment and to support the agreement of divide the property in 1976.

Another attorney was retained as a result of a reference of the Lawyer's Referral Service, who promised to support the agreement to partition in kind. Prior to the hearing, Defendant became ill as a result of the heat wave on her heart and asked him to reschedule the hearing. He claimed counsel for the Plaintiff's absolutely refused to reschedule the hearing, and after requesting a delay in the hearing twice, Defendant was forced to rely on Oxygen to attend the hearing on July 29, 1983.

Defendant was forced to cross County lines to this hearing that was conducted while the Jury was out on another Trial. The Judge ordered the property sold before the hearing was over and all of the evidence in the Court.

Counsel for the Plaintiffs presented A Real Estate Salesman who stated that

the property could not be divided, but it was established that he only visited the property for about thirty minutes. Counsel for the defense presented a Real Estate Salesman who measured the property and divided into three parts of equal value. After the Judge stated that the property had to be sold, Counsel for the defense did get permission to submit a Memorandum Brief, but the Judge ruled that the property had to be sold. on August 11, 1983.

Defendant became suspicious as to whether counsel for the defense was really representing her best interest, when her sister was allowed to avoid testifying at the trial, After repeated incidents, Defendant became convinced that he was trying to help sell the property and allow the appeal tine to expire and filed a notice of appeal on November 14, 1983.

After consulting with counsel for the defense, he promised to give better service and he was allowed to submit a Motion for a New Trial or for Alteration or Amendment of Judgment previously entered and she allowed the appeal to be set aside. Defendant became more suspicious of counsel's intentions and when he refused to present her bills at the hearing on December 19,1983, he was relieved of his service by written letter. After Defendant assumed her own case she found that he did not take a transcript of the hearing, submit the bills for repair and maintenance of the house, or submit the appraisal of the Real Estate into the record as evidence.

At the hearing on December 19, 1983, Defendant asked the Judge to allow her to argue her case. Judge Hamilton agreed to allow this and had Defendant's notes

zeroxed and she argued her own case.

Defendant stated the the initial hearing was unfair and unjust and asked for a New Trial, based on (1) Defendant was taken across County lines for Trial, which is against Tennessee State Law,(2) Plaintiff Wilma Lesnansky was not present and did not testify at the trial, (3) valuable evidence was withheld from the trial, (4) Defendant was forced to attend trial while ill in 102 degree heat wave against nationwide warning to heart patients, (5)Defendant's case was not given adequate time and consideration by the Court due to the fact that the hearing was held while the Jury was out on another trial.

The Motion for Alteration and Amendment of Order previously entered was predicated on the Court's failure to Defendant monies spent for repairs,

restoration and maintenance of the house. Defendant informed the Court that her husband cut the trees and cleared the woods from the house, which was hard on him as he is a World War II veteran and wears an artificial limb. She also objected to Plaintiffs withholding rent on tobacco crops, and avoiding paying taxes on the property. Defendant informed the Court that she did not ask for an equal share of the property, as she only wanted the house as a retirement home. The Judge overruled this motion, and instructed her to get her appeal in, in 90 days.

Defendant received a copy of the judgment prepared by counsel for plaintiff and filed a notice of appeal on January 4, 1984 as instructed by the Judge. The counsel for the defense filed an Order of dismisal from this case and withdrew the motions already argued by Defendant

according to counsel for the Plaintiff's argument.

This appeal is predicated on the failure of the Court use its general equitable powers to insure that all parties be given equal and fair justice. It is not manifestly in the best interest of the Defendant for the Court to issue and Order to sell the property on which she has been making investments of time and money to prepare a retirement home.

Counsel for Plaintiff fail to meet their burden of proof by showing with clear and satisfactory proof that the property cannot be partitioned in kind, the fact that a preponderance of the proof suggested that the premises can be partitioned and the Court's ruling is contrary to said wirght of evidence.

The party insisting on the sale must show clearly, by the facts the necissity for such sale and nothing

short of the clearest and most satisfactory proof could justify the Court ordering a sale against one of the tenants in common." Vanderburg vs Molder, 4 Tenn."The applicant for sale must show the existance of such a state of fact, as under the statute, will be sufficent to rebut the presumption of law that each of the parties is entitled to an actual partition The onus is always on he who seeks a sale". Bevins vs George, 225 S.W. 2d 409(App. 1952).

Partition is favored by Statute in the laws of Tennessee, and Defendant has invested a large amount of money in her partition of this property as a result of the agreement in 1976. Plaintiffs fail to meet their burden of proof as their case is based on the opinion of one person, whereas, Defendant showed proof that said proerty could be partitioned in kind by an expert witness."The mere opinion of a witness without facts

sustaining it that the property cannot be partitioned and must be sold is insufficient. A sale for partition based thereon will be held"utterly void." Davidson vs Bowden,37 Tenn 129.The testimony of Mr. Buford Evans A Real Estate Broker and teacher of Real Estate proves that this property can be partitioned in three parts of equal value.

Partition in kind is a separation between joint owners and this property is"not governed by the statute of frauds. An agreement between co-tenants may be proven or established by parol evidence." Fisher vs Loague., 3 Tenn Cas Shannon) Meacham vs Meacham, 195 S.W. 757 91 Tenn. McBroom vs Whitfield,McCaulty vsPeoples, 4 Tenn App. 448.

Defendant has invested in the house on this property,whereas, co-tenants have no investment in said property. "When one tenant in common, at his own expense,

puts improvements on common property and afterward partition is made such improvements should be alloted to the share of the party making such inprovements and without charge to their share of the allotment. Polk vs Gunther, 107 Tenn 16; Broyles vs Waddell, 58 Tenn. 32. The cost of the improvements can be alloted to such a co-tenant is not merely to the amount by which those improvements have increased to value of the subject property." Wilburn vs Kingsley, 3 Tenn. And " if the exact partition can not be made without material injury to the parties, or some one of them(the Commissioners) may make the partition as nearly equal as they can, and charge the larger shares with the sums necessary to equalize all of the shares and report the facts. T.C.A. 29-27-117; Hardin vs Cogwell, 52 Tenn, Burdett vs Norwood, 83 Tenn. 49.

The Court erred in the failure to investigate the partitioning of said property " A Courtof equity in a partition case does not act merely in an administrative capacity, but founds itself upon general principles of equity according to its own notion of equal justice and equity between parties. It will by its decree, adjust all equitable rights of the parties interested. Sproles vs Gray,296 S.W. 2d 839.

In conclusion, Defendant asked the Court to grant partition in kind of this property according to the agreement between co- administrators/ tenants in common of this property since 1976. And if the Court finds for the Plaintiffs and grants partition for sale, Defendant would then request that this matter be remanded back to the lower Court with instructions to award Defendant all costs of restoration and maintenance of this property.